No. 88-1426

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

HAROLD JACKSON AND OTIS PETERSON AND THE DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Respondents.

* * * *

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, JOHN R. WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON, OTIS PETERSON; DARRELL L. HAROLD, AND LUEA SORENSON, STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER the Court of Appeals committed serious error in denying Petitioner Tribe the right to be heard in the district court respecting Petitioner Omaha Indian Tribe's charges of forced, fraudulent representation by attorneys in the Department of Justice, who, over the unvarying protests of the Bureau of Indian Affairs and Petitioner Tribe, formulated and filed a constricted complaint, purportedly on behalf of Petitioner Tribe in the case of *United States v. Wilson*: (1) denying, by way of exceptions, Petitioner Tribe's title to the 700 acres of land; (2) abandoning Petitioner Tribe's valid claim to title to 3400 acres of land; and (3) constricted Petitioner Tribe's claim to 1900 acres of land, with full knowledge that Petitioner Tribe, acting by and through an attorney of its own choice, was in the process of preparing Petitioner Tribe's case of *Omaha v. Wilson*, with the objective of quieting Petitioner Tribe's claim to title to 6390 acres comprising the Blackbird Bend Meander Lobe in Monona County, Iowa?

WHETHER the Court of Appeals committed serious error in declaring that Petitioner Tribe's fraud charges were "frivolous and wholly without merit" and that Counsel for Petitioner Tribe filed "a totally frivolous pleading," when both the Court of Appeals and the district court had denied Petitioner Tribe's right to be heard respecting its fraud charges and arrived at its conclusion that Petitioner Tribe's fraud charges were "frivolous and wholly without merit" without a scintilla of evidence to support those conclusions, which are contrary to uncontroverted sworn statements and official documents establishing the fraud?

WHETHER the Court of Appeals committed serious error in upholding the district court's declaration that Petitioner Tribe's charges of fraud were "untimely" and "merit no attention or consideration" when both the Court of Appeals and the Supreme Court have held that timelinesss is not a factor where fraud is involved, declaring, moreover, that the courts themselves have a duty to purge the record of fraud?

WHETHER the Court of Appeals committed serious error

in forcing Petitioner Tribe to retry issues that were fully tried in the trial on the merits in which Petitioner and Respondents offered their oral, documentary, and demonstrative evidence without objection in regard to their respective claims to title to the full 6390 acres of which the Blackbird Bend Meander Lobe is comprised and neither Petitioner Tribe nor Respondents offered evidence respecting the constricted land *within* the Barrett Meander Line, title to which could only be proved by an adjudication of title *outside* of the Barrett Meander Line?

WHETHER the Court of Appeals committed serious error in rejecting Petitioner Tribe's assertions that the principles of *res judicata* precluded a retrial of the issues respecting title to lands *outside* the Barrett Survey Line, those issues having necessarily been tried in determining, adjudging, and decreeing title to lands *within* the Barrett Meander Line?

WHETHER the Court of Appeals committed serious error in accepting the district court's declaration that: "Nothing is gained by recataloguing the evidence here" as a substitute for compliance with Rule 52(a) which mandates the district court to " . . . find the facts specially and state separately its conclusions of law thereon"?

WHETHER the Court of Appeals committed serious error in denying Petitioner Tribe's title to "undisputed" accrestions to Petitioner Tribe's trust lands—proved without the aid of 25 U.S.C. 194—on the grounds that Petitioner Tribe was attempting to "bootstrap" 25 U.S.C. 194 respecting the claims of Respondent Iowa and upheld the claims of private Respondents contrary to proven facts?

WHETHER the Court of Appeals committed serious error in disregard of the provisions of 25 U.S.C. 194 and the Supreme Court decision of *Wilson v. Omaha*, in declaring that the only method pursuant to which Petitioner Tribe could be decreed title to lands within the Barret Meander Line would be to prove that the critical westward river movements were avulsive and effectively denied Petitioner Tribe's right to accretions to Petitioner Tribe's trust lands?

WHETHER the Court of Appeals committed serious error

when it reversed the district court, which had denied the attorneys in the Department of Justice the right to seize and take Petitioner Tribe's "profits" from its farming operations to pay for the alleged improvements on the lands decreed to Petitioner Tribe, those funds being held by the district court in an escrow account for the purpose of apportionment among the parties at the conclusion of the litigation?

* * * * * *

A list of all parties to the proceedings in the court whose judgment is sought to be reviewed:

John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce . . . with the Indian Tribes; . . .

Constitution of the United States, Article VI.

> This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.

Constitution of the United States, Amendment [V.], Rights of Persons.

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Sec. 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

25 U.S.C. Sec. 476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the

submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

28 U.S.C. 1362. Indian Tribes.

The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

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OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

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AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L., HAROLD, AND LUEA SORENSON; STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Omaha Indian Tribe of Nebraska respectfully prays the Court that a writ of certiorari issue to review the opinion of the Court of Appeals for the Eighth Circuit which was rendered on August 12, 1988, and a timely petition for rehearing *en banc* having been denied by the Court of Appeals

on November 10, 1988, the Court, by its Order of January 18, 1989, having extended the period for filing this Petition to and including February 28, 1989.

OPINIONS BELOW

The United States District Court for the Northern District of Iowa entered its Memorandum Opinion on January 13, 1984,[1] holding that Petitioner Omaha Indian Tribe could not prevail against the State of Iowa as to any lands claimed by Respondent Iowa or concerning fee-patented lands claimed by private Respondents. That Memorandum Opinion is Appendix A of this Petition. Subsequently the District Court, on May 29, 1987, entered its Final Judgment and Decree, which was amended June 30, 1987.[2] That Final Judgment and Decree is Appendix B of this Petition. Petitioner Omaha Indian Tribe appealed the Memorandum Opinion (Appendix A) and the Final Judgment and Decree (Appendix B) to the United States Court of Appeals for the Eighth Circuit. That Court of Appeals rendered its opinion on August 12, 1988.[3] That Opinion is Appendix C of this Petition. On November 10, 1988, the Court of Appeals entered its Order denying the Petition for Rehearing *en banc*. That Order is Appendix D of this Petition.[4] On January 18, 1989, the Supreme Court entered an Order extending the time to file this Petition to and including February 28, 1989. That Order of the Supreme Court is Appendix E of this Petition.[5] In addition to the Opinions and Final Judgment referred to above there are these Opinions, Findings of Fact, and Conclusions of Law to which reference is necessary in

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[1] Appendix A, *United States V. Wilson; Omaha v. Jackson, et al.; Omaha v. Agriculture* (hereafter referred to as *Omaha v. Wilson*) 578 F. Supp. 1191 (U.S.D.C.N.D.Iowa W.D. 1984), p. 5a.

[2] Appendix B, Final Judgment and Decree, May 29, 1987, *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural...Wilson;* Order June 30, 1987, Amending Final Judgment and Decree, p. 16a.

[3] Appendix C, *Omaha Indian Tribe v. Jackson; Omaha v. ...Wilson,* 854 F.2d 1089 (CA 8, 1988), p. 37a.

[4] Appendix D, Order dated November 10, 1988, p. 49a.

[5] Appendix E, Order of Supreme Court dated January 18, 1989, p. 50a.

determining the grounds of the Final Judgment and the Opinions of the courts below:[6]

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit, as stated above, was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing en banc was entered November 10, 1988, and the period for filing was extended by the Court to and including February 28, 1989.[7] The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

INTRODUCTION

Parties: Petitioner Omaha Indian Tribe, Omaha Indian Reservation, Macy, Nebraska, is a duly organized Indian Tribe, recognized by the Secretary of the Interior in accor-

[6] Opinion of the District Court, dated September 4, 1981, declaring that Petitioner Omaha Indian Tribe had proved its valid claim to title to the 700 acres involved against Respondent Iowa and Respondents Lakin, et al. That Opinion is Appendix F of this Petition: Re: *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural*...Wilson, 523 F.Supp. 874 U.S.D.C.N.D. Iowa W.D. 1981). on June 20, 1979, the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194. That Supreme Court Decision is Appendix H of this Petition: *Wilson v. Omaha*, 442 U.S. 653 (1979). The Supreme Court's Decision affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. 194. That Court of Appeals Opinion is Appendix I of this Petition: *Omaha v. Wilson*, 575 F.2d 620 (CA 8, 1978). The Court of Appeals, Appendix I, reversed the District Court's Opinion declaring that the Respondents had sustained their burden of proof against Petitioner Tribe. That Opinion of the District Court was entered May 4, 1977 and is Appendix J of this Petition: *United States v. Wilson*, 433 F.Supp. 57 (U.S.D.C.N.D. Iowa W.D. 1977). The Court of Appeals Opinion, Appendix I, likewise reversed the Findings of Fact and Conclusions of the District Court, which found as a fact and concluded as a matter of law that Petitioner Tribe had failed to sustain its burden of proof. That district Court's Findings of Fact and Conclusions of Law are Appendix K of this Petition: *United States v. Wilson*, 433 F.Supp. 67 (U.S.D.C.N.D.Iowa W.D. 1977).

[7] *See*, Appendices D and E.

dance with 25 U.S.C. Sec. 476.[8] Petitioner Tribe, on October 6, 1975, filed its Compliant in *Omaha v. Wilson* to have quieted its title in and to the Blackbird Bend Meander Lobe, a single, unitary tract of land comprising 6390 acres in Monona County, Iowa, against John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources, in the United States District Court for the Northern District of Iowa, Western Division.

Jurisdiction of District Court: Pursuant to 28 U.S.C. 1362, which provides that an Indian Tribe in the status of Petitioner, may initiate civil actions of the nature here involved arising " . . . under the Constitution, laws, or treaties of the United States." Both of Tribe's actions—*Omaha v. Jackson*, for injunction against Respondents Jackson, Peterson and Mona County; and *Omaha v. Wilson* seeking to quiet title to 6390 acres in the Blackbird Bend Meander Lobe—were initiated pursuant to 28 U.S.C. 1362.

PETITIONER TRIBE SEEKS REVIEW OF FORCED FRAUDULENT REPRESENTATION IN *UNITED STATES V. WILSON*

Petitioner Omaha Indian Tribe seeks review of the August 12, 1988 opinion of the Court of Appeals for the Eighth Circuit[9] in which that court denied Petitioner Tribe the right to be heard respecting its charges of forced, fraudulent

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[8] *See*, Appendix O, p. 269a, 272a. Complaint *Omaha v. Wilson*, C 75-4067 in United States District Court for Northern District of Iowa, Western Division.

[9] Appendix C, p. 37a, Omaha v. Jackson . . . ; Omaha v. . . . Wilson, 854 F.2d 1098 (CA 8, 1988).

Note: The complaint in United States v. Wilson was filed May 19, 1975; immediately upon being informed of that filing within 24 hours, Petitioner Tribe filed on May 20, 1975, its injunction suit, *Omaha v. Respondent Jackson, Respondent Peterson, District Court of Monona County, Iowa*, C 75-4026, Appendix L to enjoin Respondents Jackson and Peterson from interfering with Petitioner Tribe's possession of the lands within the Barrett Meander Line, stressing that United States v. Wilson was highly objectionable and filed over Tribe's protests (p. 253a para. 7). The District Court on June 5, 1975, noting the tensions between Petitioner Tribe and the attorneys in the Department of Justice, granted Petitioner Tribe's motion for an injunction: (1) maintaining Petitioner Tribe in possession of Barrett Meander line lands as *status quo*; (2) Petitioner Tribe never acquiesced in Respondent's possession (p. 260a) and (3) established escrow account p. 262a. (Infra., p. 27), Appendix M.

representation of Petitioner Tribe by attorneys in the Department of Justice in the case of *United States v. Wilson.*[10] That forced, fraudulent representation, among other things, deprived Petitioner Tribe of its title to the 700 acres of land to which the Court of Appeals refers.[11] Moreover:

> [1] The Court of Appeals, in grave error, declared that Petitioner Tribe is bound by the forced, fraudulent representation by attorneys in the Department of Justice, irrespective of the fact that Respondent Tribe represented by counsel of its own choosing, in *Omaha v. Wilson,*[12] had proved its title to the entire 6390 acres in the Blackbird Bend Meander Lobe, which included its title to the 700 acres to which the Court of Appeals refers;[13]
>
> [2] the Court of Appeals, in grave error, by its opinion has sanctioned and approved the repeated denials by the district court of Petitioner Tribe's efforts to be heard respecting Petitioner Tribe's charges of fraud;[14]
>
> [3] The Court of Appeals has further mandated that Petitioner retry issues fully heard and determined at the trial on the merits in the case of *Omaha v. Wilson* with which *United States v. Wilson* had been consolidated;[15]
>
> [4] The Court of Appeals violates the basic principles of *res judicata* in requiring the retrial of issues fully and necessarily adjudicated in the trial on the merits of *Omaha v. Wilson* and *United States v. Wilson;*[16]

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[10] Appendix N, Complaint *United States v. Wilson,* C 75-4024, p. 263a.

[11] *Infra,* p. 7.

[12] Appendix O, Complaint *Omaha v. Agricultural . . . Wilson, et al.,* (referred to in this Petition as *Omaha v. Wilson)* C 75-4067, p. 269a.

[13] *Infra.,* p. 9, Petitioner Tribe's Quiet Title Suit.

[14] Petitioner Tribes' Motion for Interlocutory Appeal, September 7, 1984, denied by Court of Appeals, October 1, 1984; Motion for Summary Judgment against Evan L. Hultman, *et al.,* March 13, 1985, denied April 23, 1985; Motion to Disqualify for Lack of Impartiality Judge McManus, March 17, 1986, denied April 11, 1986; Petition for Writ of Mandamus filed June 12, 1986, denied July 18, 1986 by the Court of Appeals.

[15] *Infra,* p. 23.

[16] *Infra,* p. 23, 24.

[5] The Court of Appeals, contrary to the express language of Rule 52(a) of the Federal Rules of Civil Procedure, affirmed the district court's refusal to enter findings; failed properly to apply the Court's opinion in *Wilson v. Omaha*; and misinterpreted 25 U.S.C. 194;[17]

[6] The Court of Appeals, in error, declared that Respondents were entitled to payment for "improvements" allegedly made, and further declared, wholly without authority and entirely without precedent, authorized the seizure by the Department of Justice of Petitioner Tribe's "profits" from its farming operations, held in escrow by the district court.[18]

FRAUD IN *UNITED STATES V. WILSON*: PETITIONER TRIBE DENIED TITLE TO 700 ACRES AND TRIBE'S TITLE TO 3400 ACRES ABANDONED

Petitioner Tribe and the Bureau of Indian Affairs, prior to, after, and at all times to date, protested the initiation and trial of the case of *United States v. Wilson* as grossly improper. Those protests were made to Myles E. Flint, Attorney, Department of Justice who formulated the complaint in *United States v. Wilson*, denying the Tribe's title to 700 acres of land and abandoning Tribe's valid claim to title to 3400 acres in the Blackbird Bend Meander Lobe. Mr. Flint and his superior were fully informed that the Tribe was preparing *Omaha v. Wilson*, being assisted and funded by the Bureau of Indian Affairs.[19] Mr. Flint and his superiors informed Petitioner Tribe and the Bureau of Indian Affairs that they were communicating with and exchanging information with attorneys for Respondents and that the Department of Justice, over Petitioner Tribe's protests and that of the Bureau of Indian Affairs, intended immediately and without preparation to

[17] Appendix C, p. 39a, 42a, 44a.
[18] Infra., p. 26.
[19] Appendix P, Petitioner Tribe's Motion for Summary Judgment, p. 276a; Affidavit p. 294a.

initiate the case of *United States v. Wilson* as demanded by attorneys for Respondents.[20]

THE INCEPTIVE FRAUD PRACTICED UPON PETITIONER TRIBE

In disregard of Petitioner Tribe's protests and those of the Bureau of Indian Affairs and without advising the Bureau of Indian Affairs or Petitioner Tribe of his intentions, Mr. Flint submitted the case of *United States v. Wilson* to Evan L. Hultman, United States Attorney, Cedar Rapids, Iowa, for filing in the United States District Court for the Northern District of Iowa, Western Division.

Evan L. Hultman, United States Attorney, Fraudulently Violated Petitioner Tribe's Valid Claims to Title and Violated Code of Professional Responsibilities

On May 19, 1975, Evan L. Hultman, United States Attorney, filed in the District Court the complaint in *United States v. Wilson.*

Prior to forcing his representation upon Petitioner Tribe in *United States v. Wilson,* Evan L. Hultman had represented Respondent Iowa as Attorney General in the cases of *Lakin v. State of Iowa* and *Peterson v. State of Iowa.*[21] Respondents Lakin and R.G.P., Inc. (Peterson) and the State of Iowa settled the issues among themselves in disregard of Petitioner Tribe's claim to the Blackbird Bend Meander Lobe.[22] Evan L. Hultman, having obtained title for Respondent Iowa to the approximately 700 acres denied Petition Tribe's title to that 700 acres of land in the complaint filed by Mr. Hultman in *United States v. Wilson.* Plate I graphically displays the apportionment of the Blackbird Bend Meander Lobe among Respondent Iowa and Respondents Lakin and R.G.P. Inc., (Peterson).

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[20] Appendix W, Reply to Opposition p. 337a; attached Memorandum, p. 351a.

[21] Appendix P, Motion for Summary Judgment, p. 276a; Affidavit p. 291a; Appendix Q, p. 299a; *Lakin v. Iowa*; Appendix R p. 304a, 306a; Answer and Desclaimer Evan L. Hultman, State of Iowa; Appendix S, p. 307a; *Peterson v. State of Iowa*; Appendix T, p. 318a; 319a; Answer Evan L. Hultman, State of Iowa.

[22] *Ibid.*

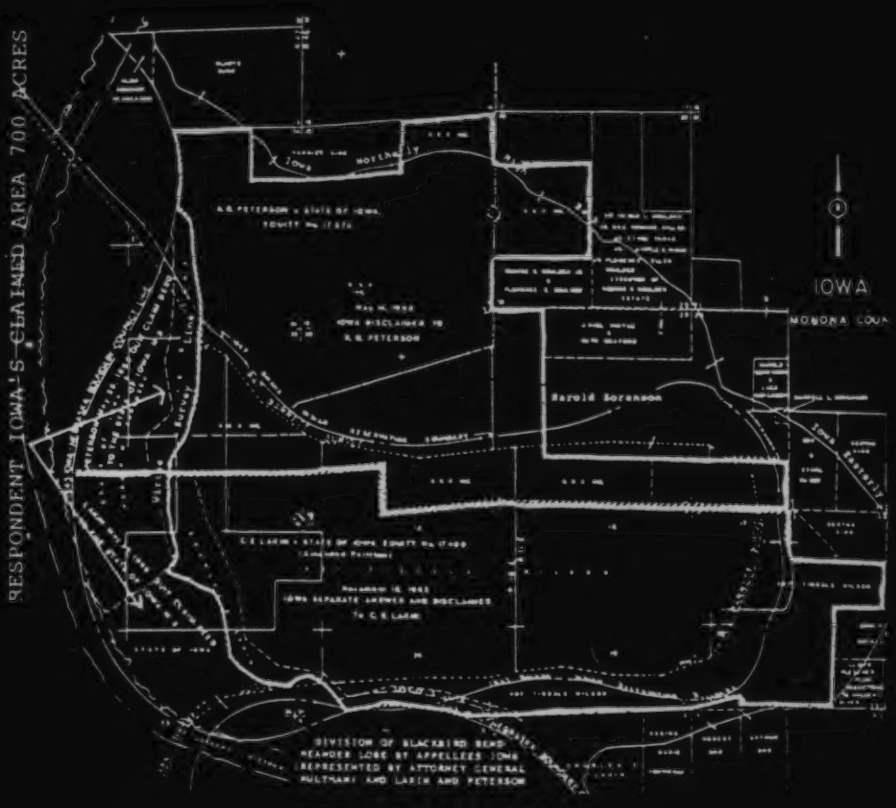
RESPONDENT IOWA'S CLAIMED AREA 700 ACRES
IOWA
Harold Sorenson
DIVISION OF BLACKBIRD BEND MEANDER LOBE BY APPELLEES IOWA REPRESENTED BY ATTORNEY GENERAL HULTMAN AND LARIN AND PETERSON

PLATE I
APPORTIONMENT AMONG RESPONDENTS OF
BLACKBIRD BEND MEANDER LOBE
WITH RESPONDENT IOWA REPRESENTED BY EVAN L. HULTMA

Hultman's Forced, Fraudulent Representation

Petitioner Tribe, as reviewed above, within 24 hours of being informed that *United States v. Wilson* had been filed, protested that filing in Petitioner Tribe's injunction suit, *Omaha v. Jackson*,[23] and on June 3, 1975, filed its "Application To Dismiss or Hold in Abeyance" the case of *United States v. Wilson*.[24] Mr. Hultman's response, as United States Attorney, was filed June 16, 1975, declaring that he could force his representation upon Petitioner Tribe and that he could proceed without consent or acquiescence of Petitioner Tribe.[25] On July 1, 1975, the district court sustained Evan L. Hultman's contention, denying Tribe's Motion To Dismiss or Hold in Abeyance.[26]

Petitioner Tribe's Quiet Title Action, Omaha v. Wilson[27]

Petitioner Tribe completed its investigations in support of its claim and on October 6, 1975, filed its quiet title action, *Omaha v. Wilson*, claiming title to the 6390 acres in the Blackbird Bend Meander Lobe, invoking the jurisdiction of the district court pursuant to 28 U.S.C. 1362 and was represented in that proceeding by counsel of its choice, pursuant to 25 U.S.C. 476.[28]

Respondents, unable to deraign their titles to patents from the United States, asserted affirmatively in their answers by way of counterclaims[29] that (1) the Blackbird Bend Meander Lobe was totally obliterated and washed away by Missouri River action thereby extinguishing Petitioner Tribe's title; and (2) the Blackbird Bend Meander Lobe was replaced in its

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[23] Appendix L, p. 253a, *Supra., p. 4, ftn. 9.*

[24] Appendix Y, Petitioner Tribe's "Application to Dismiss or Hold in Abeyance" the case of *United States v. Wilson*, p. 367a.

[25] Appendix Z, Response of Evan L. Hultman to Application, p. 369a.

[26] Appendix AA, Order of July 1, 1975, p. 369a, 371a.

[27] A few landowners occupying small tracts of land within the Blackbird Bend Meander Lobe were joined as party defendants in *Omaha v. Wilson*, C 75-4067, who did not participate in the trial on the merits. It is reasonably expected that those adverse claims can be satisfactorily resolved by the process of settlement.

[28] Appendix O, Complaint *Omaha v. Wilson* C 75-4067, p. 269a.

[29] Appendices BB, and CC, p. 279a, para. 8; DD, p. 384a, para. 42, p. 387a, para. 37, 386a; Appendix EE, Sorenson does not deraign title, p. 390a.

entirety by accretions to the Iowa riparian bank. Respondents claim their titles are derived from owners of the riparian land to which the alleged accretions attached.[30]

To counteract and to overcome the fraud practiced upon Petitioner Tribe by Messrs. Flint and Hultman, the Tribe moved the district court for an order consolidating the case of *United States v. Wilson*, C 75-4024 with Tribe's case of *Omaha v. Wilson*, C 75-4067, which case totally encompasses the constricted and limited area to which *United States v. Wilson* pertains. On January 26, 1976, the district court granted Petitioner Tribe's motion for consolidation.[31] Plate II set forth below graphically displays the constriction by the Department of Justice of Tribe's claim in *United States v. Wilson*, as contrasted to Petitioner Tribe's claim of 6390 acres in *Omaha v. Wilson*.

PLATE II

Plate II evidences the gross error committed by the district court in attempting to bifurcate the claims of Petitioner Tribe, as pleaded by Messrs. Flint and Hultman in

[30] *United States v. Wilson*, 433 F. Supp. 67, 88 para. V (U.S.D.C.W.D.Iowa, W.D.1977). See, Appendix K, p. 205a, p. 245a, V.

[31] Appendix FF, Order of January 26, 1976, p. 395a.

the case of United States v. Wilson. Plate II is Plate III of the opinion of the Court of Appeals reversing the original adjudication by the district court which declared in error, as contended by Respondents that the entire Blackbird Bend Meander Lobe was comprised of accretions to the Iowa riparian bank. As can be seen from Appendix I, page 144a, the Missouri River had—by the process of erosion of the "Northerly Iowa High Bank" and accretions to the Omaha Indian Reservation—progressed far the north and away from the 1967 Barrett Meander Line. Plate II locates the Missouri River at the toe of the Northerly Iowa High Bank. The "centre" of that River was the boundary of the Omaha Reservation, pursuant to Tribe's Treaty of 1854.

As emphasized by sworn statements, Appendix P, page 294a, para. 25, Mr. Flint, who prepared the complaint in United States v. Wilson, was fully informed that it was wholly improper to attempt to limit Petitioner Tribe's claim to title to the Barrett Meander Line as was further informed that ". . . the 1867 Barrett Meander Line was not and could not be considered a boundary line . . . ."

It is inexplicable why the district court attempted to restrict both Petitioner Tribe and Respondents to the wholly illusory Barrett Meander Line when their claims necessarily pertain to the entire Blackbird Bend Meander Lobe, as displayed by Plate II.

On April 5, 1976, the district court *sua sponte*, entered an order amending its January 26, 1976 Order of Consolidation and limited the trial to the case within the Barrett Meander Line, to which the case of *United States v. Wilson* pertains.[32]

Having completed comprehensive discovery among all parties respecting the full 6390 acres within the Blackbird Bend Meander Lobe, Petitioner Tribe sought further to insulate its case of *Omaha v. Wilson* from the fraudulent case of *United States v. Wilson* and on September 3, 1976, filed its "Motion for a Protective Order Against the Department of Justice,"[33] praying the district court (1) totally to separate the case of *Omaha v. Wilson* from *United States v. Wilson*; (2) to declare Petitioner tribe would not be bound by the forced representation of the Department of Justice; and (3) stressing in Tribe's Resolution in support of that motion that Evan L. Hultman was immersed in a conflict of interest having previously represented Respondent Iowa in the case of *Lakin v. Iowa*.[34]

The district court granted Petitioner Tribe's Motion for Protective Order, allowing Petitioner Tribe the right to offer its case in chief ahead of the Department of Justice but denying the Tribe the right to cross-examine the Department of Justice witnesses and to rebut the Department of Justice case.[35] Subsequently, the district court reversed itself, allowing Tribe to cross-examine Department of Justice witnesses and to rebut.[36]

Irrespective of the district court's *sua sponte* order of April 5, 1976 purporting to limit the trial to the constricted complaint in *United States v. Wilson*, filed by the Department

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[32] Appendix GG, *Sua Sponte* Order of April 5, 1976, p. 403a, 405a. *See, Infra*, p. 24.

[33] Appendix HH, "Motion for a Protective Order," p. 407a, and supporting Resolution, p. 411a.

[34] Appendix P, p. 276a; Affidavit, p. 291a, para. 18, *et seq.*.

[35] Appendix II, Order dated October 29, 1976, p. 416a.

[36] Appendix JJ, T.R., November 15, 1976, p. 416a, 417a.

of Justice, Petitioner Tribe[37] and all parties, including the Department of Justice perforce tried the title to the 6390 acres comprising the full Blackbird Bend Meander Lobe. The proof in that trial on the merits establishes the fact that the Blackbird Bend Meander Lobe was a single unitary tract and that the Barrett Survey was a transitory line established during a period of high water and did not constitute nor was it intended to constitute a boundary line. Rather, the Treaty of 1854 provided that the boundary of the Omaha Indian Reservation was the "centre" of the 1867 Missouri River when Barrett meandered that stream.

At the conclusion of the full trial on the merits respecting the 6390 acres of land in the Blackbird Bend Meander Lobe. Respondents filed with the district court their proposed findings of fact, conclusions of law and judgment. In those findings and conclusions, Respondents denied the applicability of 25 U.S.C. 194 which placed upon Respondents the burden of proof. The district court adopted Respondents' findings verbatim, including Respondents' interpretation of 25 U.S.C. 194, and entered judgment for Respondents, declaring that: (a) the Blackbird Bend Meander Lobe had been totally washed away and (b) that the Blackbird Bend Meander Lobe was replaced in its entirety by accretions to the Iowa riparian lands and that the Respondents derived their titles from the owners of those riparian land, all as contended by Respondents. The district court dismissed the cases of both Petitioner Tribe and the United States in its final judgment.[38]

From that judgment for Respondents, Petitioner Tribe appealed. In reversing the district Court's judgment, based upon the verbatim adoption of Respondents' findings of fact and Conclusions of law, the Court of Appeals declared that:

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[37] Note: When Petitioner Tribe rested its case in chief, it renewed its protests to the participation of the Department of Justice in the proceedings in its Motion and Objection to the Introduction of Evidence by the Department of Justice. It is stressed that, by that forced representation, there had been a "Denial by the Justice Department of the Omaha Indian Tribe's Constitutional and Civil rights to be Represented in Litigation by Counsel of Its Own Choosing," Appendix KK, p. 419a, 421a T.R. November 15, 1976.

[38] Appendix K, *United States v. Wilson*, 433 F. Supp. 67 (U.S.D.C.N.D. Iowa,W.D. 1977), p. 245a, Conclusion of Law v. Decree, p. 252a, para 7.

". . . . the entire opinion of the trial court relating to the evidence and findings of fact is essentially a memorandum of law written by the defendants." [Respondents here][39]

The Court of Appeals declared that the district court erred in refusing to apply 25 U.S.C. 194, which places upon the Respondents the burden of proof. The Court of Appeals moreover declared that the "basic finding essential to the defendants' case" that the Blackbird Bend area was totally washed away and totally replaced by " . . . new land . . . added to the Iowa riparian land from the owners of which defendants derived their title" was " . . . clearly erroneous and not supported by substantial evidence." The Court of Appeals—though rendering its opinion predicated upon the evidence at the trial on the merits involving the entire 6390 acres in the Blackbird Bend Meander Lobe—declared that the dispute centers on the ownership of an area known as Blackbird Bend surveyed in 1867 by Barrett.[40]

The Court in *Wilson v. Omaha* affirmed and remanded.[41] The Court of Appeals determined the applicable state law,[42] as mandated by the Court, and the cases were once again before the district court with reference to title to only the 700 acres which were obtained by Evan L. Hultman for Respondent Iowa,[43] in settlement of the Lakin-Peterson cases.

On Remand, the District Court Decreed Title to 700 Acres to Petitioner Tribe

On remand from the Court and the Court of Appeals, the district court, predicated upon proof offered by Petitioner Tribe in the trial on the merits, declared, adjudged, and determined, respecting title to the 700 acres, that Petitioner

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[39] Appendix I, p. 135a, 154a, ftn. 21, *Omaha v. Wilson*, 575 F.2d 620, (CA 8, 1978).

[40] *Ibid.*, p. 154a, 155a, 167a.

[41] Appendix H, p. 107a, 131a, 132a, iv, *Wilson v. Omaha*, 422 U.S. 653 (1979).

[42] Appendix I, p. 135a, 154a, 186a, *et seq.*, *Omaha v. Wilson*, 575 F.2d 620, (CA 8, 1979); *See*, also *Omaha v. Wilson*, 614 F.2d 1153 (CA 8, 1980); *cert.den.* 449 U.S. 825 (1980).

[43] *Supra.*, *p. 7, et seq.*

proved—as against Respondent State of Iowa and Respondents R.G.P., Inc., Wilson, and Lakin—that those lands were accretions to Petitioner Tribe's trust land, title to which was quieted in Petitioner Tribe. Predicated upon that determination, the district court quieted title in the Tribe to those 700 acres.[44] From that judgment for Petitioner Tribe, Respondents State of Iowa, Wilson, Lakin, and R.G.P., Inc. appealed.

District Court Reversed by Court of Appeals

The Court of Appeals reversed the district court's judgment for Petitioner Tribe. Having acknowledged: (a) the "undisputed" fact that the 700 acres of land had been washed away and replaced by accretions to Petitioner Tribe's trust lands and (b) that the destruction and replacement of the 700 acres of land had occurred prior to the entry of Respondents upon those lands, the Court of appeals cryptically declared, nevertheless, that:

> "We deem this fact not significant. It is the *area* of land now occupied by the landowners that is important. *See, Wilson v. Omaha Indian Tribe*, 422 U.S. at 668." [45]

Disregarded likewise by the Court of Appeals was the express finding by the district court that Petitioner Tribe proved its title to the 700 acres of land without the aid of 25 U.S.C. 194, " . . . by a clear preponderance of evidence . . . " [46] Irrespective of that finding, the Court of Appeals, in serious error, rejected the district court's "reasoning" because it allows the Tribe to bootstrap section 194 in asserting its claim against the State.[47] The Court of Appeals, having denied Tribe's valid claims to title as declared by the district court, then imposed upon the Tribe the obligation of proving

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[44] Appendix F, Re: *United States v. Wilson; Omaha v. Jackson; Omaha v. Agricultural . . . Wilson, et al*, 523 F.Supp. 874, title to State land in Tribe p.78a, title to fee-patented lands in Tribe against Respondents R.G.P. and Wilson, p.80a; Petitioner Tribe's Title vested without aid of 25 U.S.C. 194, p.80a, ftn.19, (U.S.D.C.N.D. Iowa W.D. 1981).

[45] Appendix G, p. 92a, 101a *United States v. Wilson*, 707 F.2d 304, (CA 8, 1982)(Court's emphasis).

[46] Appendix F, p.52a, 80a, ftn.19

[47] Appendix G, p. 0a, ftn.19 92a, 99a.

" . . . that the critical westward movements from 1879 to 1923 were avulsive . . . " adding moreover that Petitioner Tribe " . . . must prove that the river moved westward over the eastern Barrett survey land between 1867 and 1923 by avulsion . . . " [48] That ruling by the Court of Appeals is challenged by Petitioner Tribe .[49]

The Court of Appeals, in error, as a condition to entering a judgment for Petitioner Tribe to the 1900 acres, to which the attorneys in the Department of Justice constricted Tribe's claims, declared that the value of the improvements made by Respondents upon the Tribe's Blackbird Bend lands must be paid.[50]

The Court of Appeals again remanded the matter to the district court, which entered its final judgment, from which Petitioner Tribe appealed.

District Court's Memorandum Opinion, and Final Judgment and Decree Consummate the Inceptive Fraud Constricting and Denying Tribe's Title

Confronted with the mandate from the Court of Appeals that reversed the district court's judgment in favor of the Tribe and confronted with the cryptic language of the Court of Appeals, which is impossible to reconcile with the evidence, the district court on January 13, 1984 entered its Memorandum Opinion.[51] In that Memorandum Opinion, the district court expressed its reason for refusal to enter findings, declaring that: "Nothing is gained by recataloguing the evidence here," observing that the Court of Appeals had foreclosed the district court's views on the evidence as being a foundation for a decision. The district court concluded " . . . no party can meet its burden of proving accretion or avulsion."[52]

Continuing, in total error, the district court declared that, ". . . by chipping away at the issues," the case was

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[48] *Ibid.*, p. 101a, 102a.

[49] Infra., p. 25-26.

[50] Appendix G, p. 104a; *see*, also Appendix C, p. 44a *et seq.*

[51] Appendix A, p. 5a, 7a. *United States v. Wilson*, 578 F. Supp 1191 (U.S.D.C.N.D. Iowa W.D. 1984).

[52] *Ibid.*, p. 8a.

confined to 2900 acres with "... only ... approximately 700 acres ... still in dispute." That erroneous statement is made irrespective of the fact that the district court had tried the issues on the merits, as asserted by Petitioner Tribe and the Respondents, and had entered findings of fact and the original judgment,[53] which, *of necessity*, involved the entire Blackbird Bend Meander Lobe. In reversing that judgment, the Court of Appeals in its decision, *of necessity*, involved the entire Blackbird Bend Meander Lobe, not the 2900 acres within the Barrett Meander Line.[54]

Confronted with the district court's adamant insistence that Petitioner Tribe's claim was confined to 2900 acres, Petitioner Tribe was forced—reluctantly—to expose the forced, fraudulent representation of the Department of Justice attorneys, Messrs. Flint and Hultman, who, at the behest of the Respondents, had attempted to reduce Petitioner Tribe's claim to title from 6390 acres to 1900 acres.

The district court, having emphasized that it (1) had not heard and (2) would not hear Petitioner Tribe's charge of forced fraudulent representation, entered its May 29, 1987 final judgment and decree, amended by the Order of June 30, 1987. The district court further declared that the Department of Justice attorneys could not use Petitioner Tribe's escrow funds toward payment to Respondents for alleged improvements on Petitioner Tribe's lands.[55]

From that final judgment and decree of the district court, Petitioner Tribe sought review from the Court of Appeals.

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[53] *Ibid.*, p. 6a. *Note*: The district court seriously erred in declaring that the Tribe was claiming "11,000 acres of land ... known as Blackbird Bend." The district court knew full well, or most assuredly should have known, based upon the protracted trial on the merits, that the Blackbird Bend Meander Lobe was comprised of 6390 acres and additional lands are claimed by the Tribe in Monona and Mission Bend areas, which areas have not been tried and were not before the district court in these proceedings.

[54] *Supra*., p. 4.

[55] Appendix B, p. 16a. *United States v. Wilson* Final Judgment and Decree, dated May 29, 1987, as amended by the Order of June 30, 1987.

resulting in the August 12, 1988 Decision[56] to which this Petition pertains.

ARGUMENT

FORCED FRAUDULENT REPRESENTATION IS FRAUD AGAINST PETITIONER TRIBE AND AGAINST THE COURTS

The Court of Appeals for the Eighth Circuit, in its hallmark decision, *Fiske v. Buder*, declares that when:

> . . . [a clients's] attorney fraudulently connives at his defeat or sells out his client's interests . . .

it is fraud of a character that will justify a court setting aside a judgment irrespective of the lapse of time.[57] Mr. Flint's "sellout" of Petitioner Tribe has been fully reviewed.[58]

Evan L. Hultman United States Attorney, joined Mr. Flint in "selling out" Petitioner Tribe's interests by filing the intentionally constricted complaint in *United States v. Wilson* and personally forced his rejected representation upon Petitioner Tribe in that litigation.[59] Mr. Hultman responded, that Petitioner Tribe's charges involved events that took place "10 and 20 years ago."[60] That is not the issue. Mr. Hultman ignores the fact that he acted unethically in denying Petitioner Tribe's title to the same 700 acres of land he had obtained for Respondent Iowa in previous litigation. The Department of Justice, in seeking to defend Mr. Hultman, makes the specious statement that it ". . . is simply irrelevant that Mr. Hultman had previously represented Respondent Iowa."[61] That statement is bizarre. It is most relevant that Mr. Hultman "sold out" Petitioner Tribe in *United States v. Wilson* for the benefit of his former client Respondent Iowa.

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[56] Appendix C, p.37a, *Omaha v. Jackson . . . Omaha v. . . . Wilson*, 894 F. 2d. 1089 (1988).

[57] *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942); *cert.den* 273 U.S. 756 (1942).

[58] Supra., p.7, *et seq.*

[59] Appendix Z, p.369a, 370a.

[60] Appendix V, p.329a, 331a, para. I; 335a, IV.

[61] Appendix PP, Brief of United States, p.457a.

No mention is made whatever by the Department of Justice to the basic charges against Mr. Flint.[62] Counsel for Petitioner Tribe is vituperatively assailed by the Department of Justice's response to Petitioner Tribe's request for a writ of mandamus[63] and by Mr. Hultman in his opposition.[64] If there is merit to the charges of the Department of Justice, which is denied, Counsel should be punished along with Messrs. Hultman and Flint.

The Court of Appeals sustained the district court's denial of Petitioner Tribe's efforts to be heard in regard to the fraud charges.[65]

Petitioner Tribe again raised the issue of fraud at the March 9, 1987 hearing, at which time the district court declared that (1) it had not and (2) will not hear those fraud charges, stressing " . . . the fraud question, I just can't let that rabbit into this arena."[66] By an Order dated April 1, 1987, the district court declared that the Tribe had not been denied its right to be heard respecting Petitioner Tribe's " . . . charges of fraudulent representation by the Department of Justice."[67]

On May 1, 1987, Petitioner Tribe challenged that April 1, 1987 Order, and the district court admitted that the fraud charges were not mentioned by Petitioner Tribe and that fraud could be gleaned only by way of " . . . innuendo, rather than by direct reference."[68]

The Supreme Court has expressly declared that those attorneys in the status of Messrs. Flint and Hultman as agents of the Trustee United States are charged with fulfilling their obligations in conformity with the most "exacting fiduciary standards."[69]

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[62] Appendix U, p.321a, 327a, Appendix X, p.363a, 366a. Appendix P, p.276a, 294a; Appendix W, p.337a, 351a, *et. seq.*

[63] Appendix 00, p.443a; Appendix QQ; p. 461a, denial of pet. for mand.;

[64] Appendix V, p.329a, 331a, para.II.

[65] *Infra.*, p.24., *et seq.*

[66] Appendix LL, T.R. March 9, 1987, p. 427a-429a.

[67] Appendix MM., p. 430a, 431a.

[68] Appendix NN., p.435a, 442a.

[69] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

The Court of Appeals' August 12, 1988 decision departs drastically from its *Arkansas v. Dean* decision in which that court declared that disqualification [of attorney] is an ethical, not a legal matter[70] and is in the public's as well as a client's interest. Continuing, the Court of Appeals states that the public's interest cannot be disregarded by a court's permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility.[71]

In its *Arkansas* decision, there was extensively reviewed Canon 9 of the Code of Professional Responsibility declaring that "[a] lawyer should avoid even the appearance of personal impropriety." A principal aspect of Canon 9 is then quoted:

> EC 9-3 After a lawyer leaves judical office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Repeated decisions have stressed the qualities of *integrity* and *fidelity* so gravely violated by Messrs. Flint and Hultman.[72] In *Fiske v. Buder*,[73] citing *United States v. Throckmorton*, the court declared that where, as here, an attorney connives to sell out his client " . . . the fraud will vitiate any judgment which could be entered."[74] In *United States v. Shotwell Manufacturing Co., et al.*, the Supreme Court reviewed fraudulent acts systematically practiced upon the district Court, the Court of Appeals, and the Supreme Court itself,

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[70] *State of Arkansas v. Dean Foods Products Co.*, 605 F.2d 380, 384 (CA 8, 1979).

[71] *Ibid.*, citing *Emle Industries, Inc. v. Patentex Inc.*, 472 F.2d 562, 574 (CA 2, 1973).

[72] *Erwin M. Jennings Co. v. DiGenova*, 107 Conn. 491 499; 141 A. 866, 868 (1968); *T C. Theater Corp. v. Warren Bros. Pictures*, 113 F.Supp. 265, 268 (U.S.D.C.S.D.N.Y.1953); *Consolidated Theaters, Inc. v. Warren Bros.* 216 F.2d 920, 924 (CA 2, 1954); In the Matter of Cipriano, 68 N.J. 398, 346 A.2d 393 (1975). *See*, Vol. 15, *Federal Practice and Procedure*, Sec. 3911; 1985 Supp., p. 245, *et seq.*

[73] 125 F.2d 841 (CA 8, 1942); *cert.den.* 273 U.S. 756 (1942).

[74] *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942); *cert.den.* 273 U.S. 756 (1942).

as here. The Court declared that corrective action was required: "The integrity of the judicial process demands no less."[75]

The Court of Appeals erroneously states that Petitioner Tribe had first raised the issue of " . . . fraud in 1976."[76] Predicated upon that misconception, the Court of Appeals declared that the Tribe had been dilatory in not raising the issue again until 1985. While the Court of Appeals does not designate its source for declaring that the Tribe had first raised the fraud issue in 1976, it would appear that the Court of Appeals was relying on the totally erroneous Order of April 1, 1987.[77] That Order attempts to establish—based upon Tribe's early motion for a protective order—that Petitioner Tribe had not been denied its right to be heard respecting its "charges of fraudulent representation by the Department of Justice."[78] An examination of the motion, the Resolution, and the district court's order of October 29, 1976, proves beyond controversy that none of those documents referred to fraud or could be honestly interpreted inferentially to refer to fraud.[79]

Fraud that strikes at the validity of a judgment, as here, can be raised at any time, particularly under the circumstances where the final judgment was entered May 29, 1987, and all of the Respondents are parties to that final judgment and, indeed, are substantial beneficiaries of the fraud challenged here by Petitioner tribe giving rise to that judgment. In the *Emle* decision[80] cited above, the court would not permit the issue of delay to preclude a party from raising issues of misconduct, far less serious than the fully supported

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[75] 355 U.S. 234, 240, 241 (1957).

[76] Appendix C, p. 37a, 40a, ftn. 4.

[77] Appendix MM, p. 430a, 431a.

[78] Appendix HH, Motion for Protective Order, with Resolution attached, p. 407a, 408a-409a; 411a.

[79] Appendix II, p. 416a, 417a, para. 1. Order of October 29, 1976, granting in part and denying in part Tribe's motion for a protective order.

[80] *Emle Industries v. Patentex*, 478 F.2d 562, 574 (CA 2, 1973); *Supra.*, see, p. 16, "District Court's Memorandum Opinion, and Final Judgment and Decree consummate the inceptive Fraud Constricting and Denying Tribe's Title."

charges against Messrs. Flint and Hultman. On the subject it is declared:

> . . . the Court's duty and power to regulate the conduct of attorneys cannot be defeated by the laches of a private party or complainant.[81]

Here, the fraud of Messrs. Flint and Hultman, as attorneys for the Department of Justice, is not only upon Petitioner Tribe but on the courts themselves. As the Supreme Court stated in *Hazel-Atlas*, fraud of that character involves the:

> " . . . tampering with the administration of justice . . . [which] is a wrong against the institutions . . . ."[82]

Adhering to the concepts of *Hazel-Atlas*, the Court of Appeals in *Virgin Island Housing Authority v. David*,[83] declared that:

> Since attorneys are officers of the court, their conduct, if dishonest, would constitute a fraud upon the court.

In *Moore*, there was extensively reviewed the concepts of *Hazel-Atlas*, declaring that, while an attorney should represent his client with singular honesty,

> " . . . his loyalty to the court, as an officer thereof, demands integrity and honest dealings with the court. And when he departs from that standard, in the conduct of a case, he perpetrates a fraud upon the Court."[84]

Predicated upon that abundance of authority and high principle, the Court of Appeals committed plain and serious error in accepting the erroneous declaration by the district court that Tribe's conduct was " . . . clearly untimely and merits no serious attention or consideration." Quite obviously the district court erred in denying Petitioner Tribe's motion to disqualify and for summary judgement.

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[81] *Ibid.*, p. 574.

[82] *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).

[83] 823 F.2d 764, 767 (CA 3, 1987).

[84] Vol. 7, *Moore's Federal Practice*, 1987-88, Cumulative Supplement, Sec. 60.33, Fraud upon the Court, p. 60-359.

JUDGEMENT OF MAY 29, 1987 IS *RES JUDICATA* RESPECTING LANDS OUTSIDE BARRETT LINE

The Decision of the Court of Appeals forces Petitioner Tribe to retry issues fully heard and resolved in the original trial on the merits.[85] The Supreme Court recognized that the Blackbird Bend litigation involved the title to the lands *inside* and *outside* the Barrett Line, noting that Respondents " . . . argued that the river . . . eroded the reservation lands . . . ." which lands were replaced by " . . . accretions . . . " that were attached to " . . . the east-bank riparian" lands.[86] Petitioner Tribe urged to the Court of Appeals that it was impossible to determine the title to the lands within the Barrett Meander Line without having first determined that those lands were not accretions to the Iowa riparian bank, which was far removed from the Barrett Meander Line.[87] It is of utmost importance that the Court of Appeals declared that: "The basic finding essential to defendants' case is the trial court's statement . . . ." that the entire Blackbird Bend Meander Lobe had been "washed away" and replaced by " . . . new land . . . added to the Iowa riparian bank . . . "[88] outside the Barrett Meander Line, Plate II above. It was stressed to the Court of Appeals that:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[89]

In *Block v. Commissioner*, the Supreme Court declared the principle that when an issue which is material has been decided by a court ". . . and the judgment could not have

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[85] Appendix C., p. 37a; 43a-44a; ftn. 5.

[86] *Appendix H, 107a; 112a; 115a. Wilson v. Omaha*, 442 U.S. 653, (1979).

[87] *See*, Plate II above, p. 10.

[88] Appendix I, p. 135a, 167a, *Omaha v. Wilson*, 575 F.2d 600, 639 (CA 8, 1978).

[89] Restatement (Second) Judgment, para. 27, p. 250.

been decided without deciding it,"[90] then the principles of *res judicata* are controlling in any other litigation among the parties involving the same subject *res*. It is manifest that the Court of Appeals violates the principles of *res judicata* in forcing Petitioner Tribe to retry the issues respecting title to the Blackbird Bend area *outside* the Barrett Meander Line.

Court of Appeals' Rulings Clearly Erroneous

Additionally Petitioner Tribe urged unsuccessfully to the Court of Appeals that the district Court's *sua sponte* order of consolidation[91] could not change or alter Petitioner Tribe's case of *Omaha v. Wilson* in which Petitioner Tribe sought to have quieted in itself title to the 6390 acres and to limit Tribe's claim to 1900 acres as prayed for in the case of *United States v. Wilson*. As stressed by the Supreme Court in *Johnson v. Manhattan*, an order of consolidation ". . . does not merge the suits . . ." or change the rights of the parties.[92]

Contrary to the record, the Court of Appeals made the *de novo* findings that Petitioner Tribe's charges of forced, fraudulent representation by attorneys in the Department of Justice were "frivolous and without merit." The Court of Appeals harshly imposed sanctions against Counsel for

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[90] 99 U.S. 686, 693 (1878). *See*, also *Partmar Corp. et al., v. Paramount Pictures, et al.*, 347 U.S. 89, 100-103 (1954); *Montana v. United States*, 440 U.S. 147, 153 (1979): "Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based upon the same cause of action. Under collateral estopel, *once an issue is actually and necessarily determined* by a court of competent jurisdiction, *that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.*" (Emphasis supplied). Those principles were applied against the Tribe in *Oglala Sioux Tribe v. Homestate Min. Co.*, 722 F.2d 1407, 1413 (CA 8, 1984); Vol. 18, *Federal Practice and Procedure*, Sec. 4421—Necessarily Decided, p. 192, *et seq.*; 1987 Pocket Part, 4421, Issue Preclusion.

[91] Appendix GG, p. 403a, 405a.

[92] 289 U.S. 472, 496-497 (1933); *See* also *Mutual Life Ins. Co., v. Hillmon*, 145 U.S. 285, 293 (1892) reviewing the background and history of the consequences of consolidation both in English practice and here. *See* also, *Degraffenreid v. General Motors*, 558 F.2d 480, 486 (CA 8, 1977). *United States v. Altman*, 750 F.2d 684 (CA 8, 1984). *Garber v. Randell*, 477 F.2d 711, 715 (CA 2, 1973). *See*, Vol. 9, *Federal Practice and Procedure*, Sec. 2382, p. 255, *et seq*; 1987 Pocket Part, p. 68, *et seq*; *See* Plate II p. 10, *Supra*.

Petitioner Tribe for allegedly filing a "totally frivolous pleading."[93] Those declarations, contrary to the record, are unprecedented.

The Supreme Court has repeatedly declared that far less definitive charges "however inartfully pleaded" should not be dismissed, adding, moreover that allegations of that character are generally taken to be true.[94] Applying the criteria applicable to clearly erroneous findings of fact, it is respectfully urged that the Court of Appeals should be reversed respecting its unsupported declarations that Petitioner Tribe's charges are "frivolous and totally without merit."[95]

The Court of Appeals, in denying Petitioner Tribe title to accretions to trust lands, admitted that it is "undisputed" that the 700 acres of land were accretions to Petitioner Tribe's trust lands but, nevertheless, inexplicably declared: "We deem this fact not significant."[96]

Rather, citing the Supreme Court's opinion, in *Wilson v. Omaha,*[97] the Court of Appeals declared "the *area* of land" is controlling. There is no basis or credence to the Court of Appeals' determination that the Court's decision in *Wilson v. Omaha* could be used in denying Tribe's title to the 700 acres.[98]

Harshly imposing upon Petitioner Tribe the constricted complaint in *United States v. Wilson,* the Court of Appeals

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[93] Appendix C, p.37a, 40a. ftn. 4.

[94] *Hughes v. Rowe, et al.*, 449 U.S. 5, 9-10 (1980), citing *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

[95] Append C., p. 37a, 40a. ftn. 4. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See*, also *United States v. Bradley-Dodson Co.*, 281 F.2d 675, 680 (1960); *Policy Holder's National Life Ins. Col. v. Harding*, 147 F.2d 852 (CA 8, 1945); *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730 (CA 8, 1965); *cert.den.* 382 U.S. 977 (1965). *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). *See*, 5 *Federal Practice and Procedure*, Wright, Miller and Kane, Sec. 1350. 551-52, cited authorities, and Pocket Part.

[96] Appendix G. p. 92a, 101a.

[97] 442 U.S. 653 (1979), Appendix G, 107a, 117a.

[98] *Supra.*, p. 14-16, Appendix F p. 52a, 79a, IV. It has been repeatedly held that Petitioner Tribe as a riparian owner, holds title to those accretions *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (CA 8, 1970); *United States v. Flower*, 108 F.2d 298 (CA 8, 1939); *Wilson v. Omaha*, 442 U.S. 653 (1979). *See*, *United States v. Claridge*, 416 F.2d 939 (CA 9, 1969).

declared that Petitioner Tribe has the obligation of proving that "westward movements" of the Missouri River across the eastern segment of the lands within the constricted complaint in *United States v. Wilson* were avulsive. The Court of Appeals, moreover, affirmed the district court's refusal to enter findings and accepted—in lieu of findings—the district court's declaration that: "Nothing would be gained by recataloguing the evidence here."[99]

The only findings ever entered on the subject of avulsions were prepared by Respondents and adopted verbatim by the district court at the conclusion of the original trial on the merits in 1976, which findings were reversed by the Court of Appeals.[100] The district court, in its Memorandum Opinion here for review, justified its failure to enter findings respecting title to the 700 acres, to which the Court of Appeals refers, concluding that " . . . no party can meet the burden of proving accretion or avulsion."[101] Petitioner Tribe proved that the avulsions that severed the Blackbird Bend Meander Lobe from the Omaha Indian Reservation in the State of Nebraska transpired largely beyond the extremities of the Barrett Meander Line.[102] As a consequence, the Court of Appeals imposed an impossible burden upon Petitioner Tribe by its mandate with which the district court did not and could not comply.

The Court of Appeals, in grave error, attempted to substitute for findings its conclusion that the evidence in the proceedings had been subjected to " . . . extensive prior scrutiny." That conclusion violates Rule 52(a) FRCP, which requires the district court to "find the facts specially and state separately its conclusions of law thereon."[103]

Petitioner Tribes
Right to Registry Fund

The district court by its June 30, 1987 Order concurred with Petitioner Tribe in its assertion that its "profits" held in

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[99] *Supra* p. 16.
[100] *Supra*. p. 13.
[101] *Supra*. p. 16.
[102] *Supra*. p., Plate II, p. 10.
[103] *Supra*. p., 6.

the escrow account [registry fund] which were derived from the Tribe's farming operations could not legally be seized by the Department of Justice, declaring that:

> Tribe will not be penalized for the government's failure for approximately 50 years to promptly seek quiet title to the trust lands. This result is an equitable balance between the Tribe's right to rents from the trust land and the government's duty to pay for improvements made prior to June 5, 1975. Accordingly the court will amend its judgment with respect to the court registry fund.[104]

The Court of Appeals reversed the district court and wholly without authority and entirely without precedent authorized the attorneys of the Department of Justice to seize and take Petitioner Tribe's profits from its farming operations.[105] It did so in total disregard of the rationale adopted by the district court to preserve and to protect the rights, interests, and property of the Tribe. Contrary to fact, the Court of Appeals declared that there is no showing that ". . . the Omaha Indian Tribe suffered in any way . . . ." due to the failure of the government to initiate a suit to quiet title.

The district court precluded the showing of damages in its *sua sponte* order.[106] Petitioner Tribe has asserted a substantial claim for damages of unpaid rentals against Respondents. That fact explains the incredible statement of the Court of Appeals that Petitioner Tribe "had not suffered in any way." The district court, however, granted the Tribe's injunction against Respondent due to the irreparable damage the Tribe would suffer "absent issuance of an injunction."[107] That injunction remained in effect until the May 29, 1987 final judgement and decree.[108]

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[104] Appendix B, "p.16a, 34a-35a," June 30, 1987 Order.

[105] Appendix C., p. 37a, 44a; Appendix RR, p. 462a, denial of Petitioner Tribe's request to recuse Chief Judge Lay.

[106] Appendix GG., p. 403a., 405.

[107] Appendix M., p. 256a, 259a.

[108] Appendix B., p. 16a, 34a-35a, as Amended by the June 30, 1987 Order.

It is manifest that the forced fraudulent representation of Petitioner Tribe by attorneys in the Department of Justice has resulted in ongoing irreparable damage, all as reviewed above. Not only did the Court of Appeals err in regard to the facts, it likewise erred in regard to the law. Neither the Court of Appeals nor Congress can seize the Tribe's property without payment of just compensation.[109] The sanctity of Petitioner Tribe's property rights and interests against misconduct of agents of the trustee is too well established for question. The Supreme Court in its *Shoshone* Decision condemned the violation of tribal rights by agents of the trustee by declaring: "Spoliation is not management."[110]

On repeated occasions the Supreme Court condemned the seizure of tribal property by agents of the trustee, as here.[111]

In the district court and in the Court of Appeals, Petitioner Tribe has directed its charges against Messrs. Flint, Hultman, and James J. Clear, attorney, Department of Justice. Mr. Clear appeared in the trial on the merits and actively participated in the forced, fraudulent representation. Mr. Clear's status was adequately described when the presiding judge declared that his presence in the courtroom was "mind boggling" but that all Mr. Clear was doing was carrying out orders.

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[109] Constitution of the United States, Fifth Amendment; "No person shall be . . . deprived of . . . property, without due process of law nor shall private property be taken for public use, without compensation."

[110] *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498 (1937).

[111] *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308 (1902); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1917); *Choate v. Trapp*, 224 U.S. 665, 677 (1912); *United States v. Cook*, 19 Wall. 591 (1873).

CONCLUSION

Petitioner Omaha Indian Tribe respectfully prays the Supreme Court to grant this petition, thus granting Petitioner Tribe the right to be heard on issues critical to its survival.

Respectfully submitted,

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